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No. \_\_\_\_\_

IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1983

JAMES W. PEKARSKI  
individually and as president, Board of Commissioners,  
Township of Bristol, et al.,

*Petitioners*

v.

ABRAHAM K. ABRAHAM

*Respondent*

**RESPONDENT'S ANSWER TO PETITION  
FOR WRIT OF CERTIORARI**

Lewis A. Walder, Esquire  
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*Attorney for Respondent*

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## STATEMENT

Respondent Abraham K. Abraham was employed by Bristol Township as Superintendent of Roads and Public Property from March 19, 1976 until January 1977 and thereafter as Director of Road and Public Property until July 25, 1979 when he was terminated because he refused to cooperate with the defendant majority faction commissioners and their political faction to accommodate their politically motivated directives. Respondent Abraham insisted that those directives be given through those channels specified by Township Ordinance. The subject directives involved denial of services to those Wards in Bristol Township represented by those commissioners which at the time of plaintiff's firing constituted the minority faction. After failing to replace respondent Abraham in his position with a political appointee a few months earlier because of a public outcry of opposition, respondent's termination was thereafter accomplished under the guise of his position being eliminated by the Board for alleged economic purposes. Respondent Abraham's duties were assumed and continued to be executed by his assistant who was designated by the defendants as acting Superintendent of the Department.

Respondent had little discretion in the execution of his duties other than determining which pot hole should be filled. His position did not empower him to make any policy decisions. Rather he was required to execute directives and implement Township policies as directed by the Township Manager, in accord with Bristol Township Ordinances.

The petitioner-commissioners of Bristol Township had terminated respondent at a meeting, the transcript of which evidences the political nature of the respondent's firing. Evidence produced at the trial of this matter demonstrated that because of the firing of the respondent, the petitioner township did not save money for the fiscal years of 1979 and 1980, but, in fact, had sus-

tained net losses of \$13,597.00 and \$2,388.00 respectively for those years because of the necessity of the township having to pay outside consultant fees to do the civil engineering work. Respondent Abraham K. Abraham had previously done this work, but such work could not be done by his successor in his capacity as acting Superintendent because of lack of education and experience in civil engineering. The testimony including pertinent portions of the Petitioner Bristol Township budget which demonstrated the Township's financial loss because of respondent's firing and thus refuted the petitioners' trial defense of economic necessity justifying the firing.

Prior to and at the trial of this matter, respondent's and petitioners' counsel stipulated that the liability issue in this cause of action would be decided by the jury finding on a single Interrogatory:

"Was plaintiff fired from his position without just cause or was plaintiff's position eliminated for reasons of economy?"

The jury at the conclusion of the liability phase of the trial in answer to Special Interrogatory stipulated to by between respondent's and petitioner's counsel made the following finding:

"We the Jury find that the plaintiff Abraham K. Abraham lost his position as Director of Roads and Public Property of Bristol Township because he was fired from that position without just cause and we therefore find for the plaintiff on the issue of liability."

Thereafter, as this was a bifurcated trial, the jury heard evidence as to damages. The jury in answer to the Court's interrogatories found as follows at the conclusion of the damages phase of the trial against the various defendants:

"The Court: What amount of money would fully compensate the plaintiff for any injury he has suffered as a proximate result of defendants' violation of his right to be deprived of his property without due process of law.

Juror No. 1: Award of \$17,365.47.

Clerk: What amount of punitive damages of any do you award against defendant James W. Pekarski?

Juror No. 1: \$2,000.00.

Clerk: Against defendant Marie L. Mascia?

Juror No. 1: \$2,000.00.

Clerk: Against defendant Anthony V. Gesualdi?

Juror No. 1: \$2,000.00.

Clerk: Against Jennie Cattani?

Juror No. 1: \$2,000.00.

Clerk: And against defendant Jerry Catania?

Juror No. 1: \$2,000.00."

On October 4, 1982, plaintiff's counsel as the prevailing party filed a Notice of Motion for Counsel Fees to the Federal District Court which heard this matter. On February 3, 1983, Federal District Court filed an Order holding:

"... it is hereby ORDERED that no later than ten (10) days for the date of this Order, plaintiff shall submit a supplemental affidavit which shall show *which of the hours* plaintiff's attorneys spent in connection with this litigation *were devoted to the claim* of unlawful deprivation of a property right, in violation of 42 U.S.C. §1983, *upon which plaintiff prevailed.*" (emphasis added)

Thereafter plaintiff's filed supplemental Motion for Allowance of Attorney's Fees which reduced the hours billed in connection with this matter from 130.9 to

126.4. Additionally at the hearing held in this matter on May 19, 1983, plaintiff's counsel further reduced the amount of hours by 4.6 hours so that the total reduced time in accord with Court Order of February 3, 1983, was 121.8 hours. A full evidentiary hearing was held by the Federal District Court on May 19, 1983, and the Court found that all the hours so listed 121.8 hours were related to the claim upon which the respondent prevailed.



## SUMMARY OF ARGUMENT

I. Counsel fees were properly awarded to respondent's counsel. The Trial Court and the Circuit Court of Appeals found that all hours for which respondent's counsel was compensated were related to the issue upon which respondent prevailed.

II. Respondent had a property right in his job because of the requirement that his termination be for just cause. The just cause of the provisions for termination under the petitioner township's ordinances vest in respondent a property right to his governmental employment under the Pennsylvania State Local Agency Law and the case law interpreting the statute.

III. Petitioners failed to preserve at trial their contention of absolute immunity based on legislative function.

IV. Petitioners failed to preserve at trial the issue of the sufficiency of evidence to allow the jury to assess punitive damages against the individual commissioners of Bristol Township.

## REASONS IN OPPOSITION FOR GRANTING THE PETITION

### Argument

#### I. Counsel Fees—42 U.S.C. §1988.

Petitioner alleges that those hours expended primarily in discovery prior to the time Respondent amended his pleadings to include the due process claim upon which he prevailed should not be compensated. However, in testimony given at the counsel fees hearing before the Federal District Court, that Court approved counsel fees only for those hours that were necessary and important factors in the successful result ultimately obtained by Plaintiff in prevailing on his due process claim. The time in dispute for which fees were approved covered primarily the taking of depositions of prospective witnesses and parties. Federal Rule of Civil Procedure 15(c) holds that any claim added by amendment, here the due process claim, relates back to the date of the original pleading:

“(c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”

The Trial Court, thus, found that plaintiff's counsel's Fee Petition, as amended, listed hours related to the issue upon which plaintiff ultimately prevailed.

Furthermore, the plaintiff's First Amendment *Elrod/Branti* claim upon which he did not prevail and his due process claim upon which he did prevail involved a common core of facts, and are related legal theories. The First Amendment claim of respondent alleged that he was fired for his refusal to conspire with and follow illegal orders given by the political majority

commissioners to punish the wards represented by the political minority commissioners. The orders were illegal in that they were not given through proper channels in accord with township regulations. The liability finding of the jury as stipulated to between counsel held:

"We the Jury find that the plaintiff Abraham K. Abraham lost his position as Director of Roads and Public Property of Bristol Township because he was fired from that position without just cause and we therefore find for the plaintiff on the issue of liability."

This Court in *Hensley v. Eckerhart*, 103 S. Ct. Rep. 1933 (1983) has clearly distinguished those cases where there is a need to reduce attorney's fees when plaintiff does not prevail on all legal theories or on all issues. The Court's basis for the distinction is based on whether those theories upon which plaintiff prevailed have a common factual core and whether the legal theories are related to those claims upon which plaintiff did not prevail. As to only those claims where there are distinctly different claims for relief based on different facts and legal theories the Court has stated:

"In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants — often an institution and its officers, as in this case — that counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved." 103 S.Ct. Rep. 1933, at page 1940 (1983)

However, this Court in the *Hensley*, *supra*, decision holds that where as here the claims for relief involve a common core of facts based on related legal theories, the

attorney's fee should not be reduced simply because the District Court does not adopt every contention raised by plaintiff:

"Where a plaintiff has obtained excellent results his attorney should recover full compensatory fee. Normally this will encompass all hours reasonably expended on the litigation and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail in every contention raised in the lawsuit. (See *Davis v. County of Los Angeles*, 8 EPD 9444 at 5049 (C.D. Cal 1974.) Litigants in good faith may raise alternative legal grounds for desired outcome and the Court rejection of or failure to reach certain grounds is not a sufficient reason reducing a fee. The result is what matters." At page 1940.

This Court at page 1943 of the majority opinion stated:

"... where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claims should be excluded in considering the amount of a reasonable fee. Where a lawsuit relief should not have his attorney's fees reduced simply because the district court did not adopt each contention raised."

Thus, here the District Court found all the listed hours in plaintiff's counsel's approved listing of hours were related to the prevailing issue which relates back to the date the complaint was filed. Furthermore, both the First Amendment freedom of association claim and the due process claim are interrelated being based on the same common case facts and related theories of law.

## II. Whether Pennsylvania Courts have determined that a just cause provision creates a property right and thus allows a §1983 claim to be asserted?

The Federal District Trial Court in determining whether a protected property right was involved in the respondent's termination looked first to the *Pennsylvania State Local Agency Law*, PA. C.S.A. Title 2, §501-508 (Purdons sup. pamphlet 1981) which governs municipal procedures including those of the Bristol Township Board of Commissioners and which states in relevant part:

"No adjudication of a local agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard."

Judge Becker of the Federal District Court cited the definition of adjudication under the Local Agency Law at §553:

"An adjudication is defined as follows:

Any final order, decree, decision, determination or ruling by an agency *affecting personal or property rights*, privileges, immunities, duties, liabilities, or obligations of any or all parties to the proceeding which the adjudication is made."

The District Court then cited §26N of the Bristol Township Manager's Ordinance which states with regard to termination of a township employee in the status of Abraham:

"No person shall be discharged without just cause."

The District Court looked to Pennsylvania case law citing *DiCello v. Board of Directors of Riverside School District*, 33 Pa. Cmwlth 39, 380 A.2d 944 (1977) and *Zimmerman v. Johnstown*, 27 Pa. Cmwlth 42, 365 A.2d 696 (1976) for its determination that the "just cause pro-

vision" governing Bristol Township's right to discharge Abraham made Abraham more than an "at will" employee. The District Court found respondent's status vested him with a property right in his employment in accord with the standard for invoking the Local Agency Law, in that "an employee has an enforceable expectation of continued employment when it has been guaranteed either by contract or by statute"; Citing *Sergi v. Pittsburgh School District*, 28 Pa. Cmwlth 576, 368 A.2d 1359, 1361 (1977), *Necci v. School District of the City of Erie*, 53 Pa. Cmwlth 259, 416 A.2d 1171 (1980); *Fair v. Delaney*, 35 Pa. Cmwlth 103, 385 A.2d 601 (1978). Judge Becker of the Federal District Court found respondent's status under the Bristol Township Ordinances as analogous to *DiCello* and *Zimmerman* by the fact that such a just cause provision needed for termination in Bristol Township sets forth a broad flexible standard against which reasons for discharge could be judged. Thus, such a just cause provision is sufficient to distinguish respondent from an at will employee, therefore giving him an enforceable expectation of continued employment.

Petitioner Bristol Township argues that if the Township in its defense avers that its reason for terminating plaintiff Abraham is due to economy reasons; this immunizes respondent's termination from Court review. The petitioners contend that by reason of their defense of termination for economy reasons, the Court cannot look to see if in fact this was the valid reason for firing the respondent. Such a position is contrary to the very cases which petitioners cite as a basis for their contention. In *Sergi v. School District City of Pittsburgh*, 28 Pa. Cmwlth 576, 368 A.2d 1359 (1977) the Court there states at page 1361 in discussing the applicability of PA.C.S.A. Title 2, *The Local Agency Law* that:

"The issue here is whether or not the dismissal for reasons of economy of an *untenured* non-professional employee by a school district is an adjudica-

tion under this law . . . we are persuaded therefore that the *termination of the appellant's employment for economy reasons was an adjudication within the purview of Local Agency Law only if he had an enforceable expectation of continued employment which has been guaranteed either by contract or statute. . .*" (emphasis added)

In *Sergi*, supra, since plaintiff was a non-tenured employee and had no other statutory basis for his continued employment he did not have the requisite enforceable expectation of continued employment. Had the plaintiff in *Sergi*, supra, had tenure or protection such as the statutory Bristol Township "just cause for termination" provisions, then the plaintiff in *Sergi* could well have challenged his termination which is fully in accord with Judge Becker's (Federal District Court) reasoning in this case. Petitioners also cite two Pennsylvania Supreme Court cases, *Gaul v. Philadelphia*, 384 Pa. 494; 121 A.2d 103 (1956) and *Essinger v. City of New Castle*, 275 Pa. 408, 119 A. 479 (1923) as a basis for their contention that an individual who is not an at will employee and, who, as respondent has alleged that the reason for his termination is a subterfuge still is without right to a hearing or judicial review of his termination. In *Gaul v. Philadelphia*, supra, summary judgment had been granted to plaintiff employees ordering reinstatement of the respective plaintiffs to their positions in City government. The Pennsylvania Supreme Court in that case only held that the summary judgment on the pleadings, could not be granted as issues of fact had to be determined at trial. The City of Philadelphia's answer for purposes of the summary judgment motion "that the elimination of its employees being for economy reasons" had to be accepted as true. Here the issue of the reason for respondent's firing was determined by the jury, and the jury decided that the defendants justification of economic necessity was subterfuge as per the jury's answer

to the special Interrogatory. In *Essinger v. City of New Castle*, supra, the parties apparently stipulated that the termination of employees in that matter was a bona fide attempt to cut down the expenses of the City as per the opinion of Court which stated:

*"Admittedly in the present case, the course pursued was not taken to secure to the removal of Essinger on political grounds, or as a mere subterfuge, adopted to reach such end by apparently legal methods, but was a bona fide attempt to cut down the expenses of the City by ceasing to engage one whose services were believed not requisite for the proper conduct of its affairs."* Page 480 (emphasis added)

The stipulation in *Essinger*, supra, is in distinction to the finding of the jury in this matter in that the petitioners' excuse for firing respondent was a subterfuge.

### **III. Whether petitioners' contention of absolute immunity by reason of legislative function was preserved at the trial of this matter?**

The Third Circuit Court of Appeals properly found that petitioner never moved for a Summary Judgment on this ground, nor did they make a Motion for Directed Verdict or for judgment notwithstanding the verdict on such a ground. Petitioners did not request an instruction on the matter, nor did they make any objection on the court's failure to charge on the issue. The matter was first raised by letter after Briefs were filed to the Third Circuit Court of Appeals. The Third Circuit found because the contention was never presented to the District Court, absent the announcement of a new rule of law, it could not be considered by the Third Circuit Court of Appeals. The Third Circuit found that there were no other special circumstances present to allow it to consider such a contention.



**IV. Whether petitioners preserved their right in the Trial Court to raise the issue of the sufficiency of evidence to allow the jury to assess punitive damages against the individual commissioners of Bristol Township?**

The Third Circuit Court of Appeals found that the petitioners' basis for objection to punitive damages was not preserved in a Motion for Directed Verdict. At trial, petitioner duly raised a motion as to sufficiency of evidence as to liability but not on the issue of damages. The verdict slip was stipulated to between petitioner and respondent, stated:

"Was plaintiff fired from his position without just cause or was plaintiff's position eliminated by reason of economy?"

The jury returned a verdict finding that respondent lost his position because he was fired from that position without just cause. Before damages interrogatories were submitted to the jury, they were shown to petitioners' counsel who stated:

"Well I would have an objection to punitive damages generally as to any of the defendants. Any action that was taken by them would have to be in their capacity as township managers and as commissioners in acting on behalf of the township. I don't believe that punitive damages would be appropriate."

In *Newport v. Fast Concerts, Inc.*, 453 U.S. 247, 69 (1981) holds that while the municipality may not be held liable for punitive damages, municipal officials can be. Therefore, the ground for objection of the submission of punitive damages as a matter of law was groundless. At no point before the case was submitted to the jury did defendant raise any question about the sufficiency of the evidence as to such punitive damages, nor did the defendant make any objection to the court's charge with

respect to punitive damages. Thus, under Federal Rule of Civil Procedure 51, petitioner has no grounds for objecting to the trial court's instruction. Furthermore, this issue would not be preserved on a Motion for Judgment Notwithstanding a Verdict as the issue was not asserted in a Motion for Directed Verdict as per *Lowenstein v. Pepsi-Cola Bottling Co.*, 536 F.2d 9, 10-11 (3rd Circ. cert denied) 429 U.S. 66, (1976).

### CONCLUSION

For all of the aforesaid reasons, Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

WALDER, MARTIN & KRESMAN, P.C.

By: \_\_\_\_\_  
LEWIS A. WALDER  
Attorney for Respondent

**CERTIFICATION**

I hereby certify that copies of Respondent's Answer to Petition for Writ of Certiorari have been served to each of the following

by personal service:

Alexander L. Stevas, Clerk  
U.S. Supreme Court  
1 First Street, N.E.  
Washington, DC 20543  
(40 copies)

and by first class mail:

Bernard A. Moore, Esquire  
410 Mill Street  
Bristol, PA 19007  
(3 copies)

WALDER, MARTIN & KRESMAN, P.C.

By: \_\_\_\_\_  
LEWIS A. WALDER  
Attorney for Respondent

DATE: May 18, 1984